80-1041

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term 1980

No. _____

VIRGIL R. RIZZO, Petitioner

versus

THOMAS L. DAVIS, District Director
Internal Revenue Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Virgil R. Rizzo
pro se

P.O. Box 524
Warrendale, PA
15086

QUESTION PRESENTED

Whether the Petitioner may be denied due process and access to the courts to contest a tax deficiency determination because a "90 Day Notice", not received by him, was mailed to an address other than his certified "last known address" as required by 26 U.S.C. 6212.

QUESTION PRESENTED

Whether the Petitioner may be denied due process and access to the courts to contest a tax deficiency determination because a "90 Day Notice", not received by him, was mailed to an address other than his certified "last known address" as required by 26 U.S.C. 6212.

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SUPREME COURT OF THE UNITED STATES

October Term 1980

No._____

VIRGIL R. RIZZO, Petitioner

versus

THOMAS L. DAVIS, District Director

Internal Revenue Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on July 25, 1980, rehearing denied September 22, 1980, affirming the decision of the District Court for the Western District of Pennsylvania that the Petitioner may not under the Equal Protection Clause of the Fifth Amendment to the United States Constitution, have access to the courts.

OPINION BELOW

There was no opinion rendered in the Court of Appeals; the Judgment of the Court of Appeals issued on July 25, 1980, is set out in Appendix A, infra. The Order and Memorandum of the District Court are unpublished and are set out in Appendix B, infra.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Petitioner may be denied due process and access to the courts to contest a tax deficiency determination because a "90 Day Notice", not received by him, was mailed to an address other than his certified "last known address" as required by 26 U.S.C. 6212.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V

"No person shall....be deprived of life, liberty or property, without due process of law...."

STATUTE INVOLVED

The Statute involved is 26 U.S.C. 6212(b).

United States Code, Title 26:

Section 6212 NOTICE OF DEFICIENCY.

(b) Address For Notice of Deficiency -

(1) Income and Gift Taxes and Taxes Imposed by Chapter 42--In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient....

STATEMENT OF THE CASE

This petition arises out of the judgment of the Third Circuit Court of Appeals which found that the Internal Revenue Service may ignore its own rules and send a statutory notice of tax deficiency to an address obtained from a power of attorney, instead of that listed on the Petitioner's tax return, denying the Petitioner notice and due process to contest the deficiency in any court. Had this case been brought before the Fourth, Sixth, or Ninth Circuits, Petitioner's due process rights would not have been so denigrated.

The IRS sent two "90 Day Notices of Deficiency" for assessed taxes of $26,707.93 plus penalties and interest to a Florida address obtained from a power of attorney form executed by the Petitioner before his return to Pennsylvania from Florida.[1]

1. The power of attorney was a standard IRS Form 2848 which requested that copies of notices be sent to the attorney listed. It neither directed a change of address nor was it intended by the Petitioner to be a change of address.

The notices were never received by the Petitioner and were returned unclaimed to the Agent.[2] The Petitioner was then precluded from seeking redetermination in the Tax Court.

Subsequently, the IRS filed a "Federal Tax Lien" for the full amount of tax assessed and sent a copy to the Petitioner in Pennsylvania. This was the first notice that the Taxpayer had of any deficiency. Because the lien is so powerful, restrictive, and compounding, the Petitioner's dilemma is perpetual.

Section 6212(b)(1) of the Internal Revenue Code of 1954 and due process require that a notice of deficiency be mailed to a taxpayer's "last known address" so that he may contest the alleged deficiency in Tax Court instead of being required to pay the full amount due before filing for a refund. Flora v. United States, 357 U.S. 63 (1958) aff'd on rehearing 362 U.S. 145 (1960).

Petitioner's address since 1970 was unquestionably listed by the IRS as being in Warrendale, Pennsylvania. Prior to the hearing before the District Court, the Petitioner received answers to questionnaires he had

2. Copies of the notices were also not received by the holder of the power of attorney.

sent to the IRS Service Centers. The replies affirmed that his address was, continuously from 1970 to present, Warrendale, Pennsylvania, (App-C.1-2), the address which he had listed on his tax returns. Petitioner continued to maintain his home in Pennsylvania because of interruption for military service, education, and change in place of employment.

In the statutory notice of deficiency for the year ended December 31, 1973, the amount of deficiency arrived at was from disallowance of investment losses because of failure to explain sources of funds. The Internal Revenue Service never attempted to contact the Petitioner or his representative regarding an audit for the purported deficiency year and arbitrarily disallowed the Petitioner's return as filed without such audit.[3] The Revenue Agent never attempted to ascertain the Petitioner's correct address despite the Commissioner's own field manual which instructs agents where there is a question as to the proper mailing address, duplicate original notices should be sent.

3. The Florida Agent from the beginning had no jurisdiction over the Petitioner's return when such return was filed in Pittsburgh, the sole address as listed and as certified by the IRS.

INTERNAL REVENUE SERVICE MANUAL, Section 4462.1(3). Notice was not sent to the sole address the agency had on file for the Petitioner; the IRS Agent did not attempt to send the 90 day notice to the correct address when he was put on notice that it was not received after it was returned unclaimed. In failing to abide by this duty, the Agent precluded the Petitioner from showing that the Commissioner acted arbitrarily in making his determination. Because the deficiency is so large, the Petitioner is precluded from paying the full amount and seeking relief by a refund suit. Due to Petitioner's lack of financial means, which precludes him from seeking judicial determination of his correct tax liability, he petitions this Court for writ of certiorari to determine that the standard used to determine his "last known address" was not properly applied and is inadequate since it deprives him of due process and equal protection of the law as guaranteed by the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari to resolve the conflict in the Circuits and to protect the rights of the Petitioner. The Conflict beween the Third Circuit and other Courts of Appeal and the Tax Court, exists as to whether an address on a power of attorney form which directs that only copies of notices and correspondence be sent to the holder of the power, constitutes the "last known address" of the Petitioner instead of the address as shown on his tax return for the year in question.

In conflict with the Third Circuit the Tax Court has held that a power of attorney form that requests only "copies" of notices and correspondence is insufficient to constitute a "last known address" within the meaning of 26 U.S.C. 6212(b)(1). Reddock v. Commissioner, 72 T.C. 21 (1979). That court, as well as other courts, holds that the address listed on the taxpayer's form 1040 for the year involved is the proper "last known address", contrary to the opinion of the trial court in the instant case and the Third Circuit by affirmation. See Kennedy v. United States,

403 F. Supp 619 (W.D. Mich. 1975) aff'd, 556 F.2d 581 (6th Cir. 1977); Alta Sierra Vista, Inc. v. Commissioner, 62 T.C. 367 (1974) aff'd, 538 F.2d 334 (9th Cir. 1976); Luhring v. Glotzbach, 304 F.2d 556 (4th Cir. 1962); Wagner v. United States, 473 F. Supp. 276 (E.D. Pa. 1979); Green v. United States, 437 F.Supp. 334 (N.D. Okla. 1977); Butler v. District Director of Internal Revenue, 409 F.Supp. 853 (S.D. Tex. 1975); Timmons v. Commissioner, 37 T.C.M. 1134 (1978); Most v. Commissioner, 31 T.C.M. 1062 (1972); McCormick v. Commissioner, 55 T.C. 138 (1970).

The construction and application as to what constitutes a "last known address" within the meaning of 26 U.S.C. 6212 (b)(1) as enacted by Congress is troublesome and confusing raising constitutional issues which will involve repeated widespread litigation until they are settled by this Court. The conflict in the application of the proper criteria to determine a taxpayer's last known address is also apparent within the Third Circuit's Eastern District of Pennsylvania in Wagner v. United States, 473 F. Supp. 276 (E.D. Pa. 1979) and the instant case decided in the Western

District of Pennsylvania. The court in Wagner held that the address listed on the taxpayer's form 1040 for the year involved is the proper last known address and not that which was listed on a power of attorney form contrary to the opinion of the District Court in the Western District of Pennsylvania and the Court of Appeals by affirmation. The perplexity and conflict between the courts as to what criteria constitute a taxpayer's "last known address" require this Court to exercise its supervisory powers to settle this issue and to provide for clear and equal administration of justice in all cases.

II.

This Court should grant certiorari to exercise its power of supervision over the Court of Appeals because of the departure from the mandated course of judicial proceedings and the conflict with applicable decisions of this court.

The Court of Appeals for the Third Circuit has interpreted the term "last known address" for purposes of 26 U.S.C. 6212 as "that address where the Secretary (or his delegate) reasonably believed the taxpayer wished notice to be sent." Delman v. Commissioner,

384 F.2d 929, 932 (1967), cert. denied, 390 U.S. 952 (1968).[4] On the uncontroverted facts before the District Court, the Internal Revenue Service had certified that the Petitioner's last known address was Pennsylvania (App. C. 2-3); therefore, satisfying the provision of reasonablness. The Court of Appeals then, however, permitted the IRS to act in direct conflict with this standard by affirming that another address was proper. The plain violation of the statute precluded the Petitioner from actual notice of any deficiency and the ability to contest it in the Tax Court. This is in conflict with the due process standards set forth by this court in Boddie v. Connecticut, 401 U.S. 371 (1971); Laing v. United States, 423 U.S. 161 (1976); and Commissioner v. Shapiro, 424 U.S. 614 (1976) which overruled Phillips v. Commissioner, 283 U.S. 589 (1931).

Since the Petitioner is precluded from seeking redetermination in Tax Court, this Court requires that he pay the full tax due before he may either file for a refund or seek judicial determination of the validity of the assessment. Flora v. United States, 357 U.S.

4. In Delman, notice was received by the taxpayers and their attorney in time to properly petition the Tax Court; due process and equal protection were not at issue.

63 (1958) aff'd on rehearing 362 U.S. 145 (1960).[5] The Petitioner, however, as attested to in the District Court, is unable to pay the purported deficiency. He is, therefore, precluded from contesting the tax deficiency in any court whatsoever; a discrimination based on financial means providing equal protection only to the affluent.[6]

This Court has said that "[d]enial of an opportunity to litigate in the Tax Court is out of keeping with the thrust of the Code" and "[d]enying a Tax Court forum to a particular class of taxpayers is sufficiently anomalous that an intention to do so should not be imputed to Congress when the statute does not expressly so provide." Laing v. United States, 423 U.S. 176 (1975). The Petitioner has been denied due process and equal protection of the

5. Justice Whittaker, Harlan, Frankfurter and Stewart dissenting.

6. This Court has never held that wealth alone is a "suspect criteria" requiring strict scrutiny under equal protection challenges. San Antonio School District v. Rodriquez, 411 U.S. 1 (1973). However, it has held that wealth, or the lack of it, cannot be the sole basis on which a citizen is deprived of some essential public right or benefit. The essential right to vote, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); to hold public office, Lubin v. Panish, 415 U.S. 709 (1974); the right to counsel and a transcript on appeal, Douglas v. California, 372 U.S. 353 (1963); and the right of access to the courts, Boddie v. Connecticut, 401 U.S. 371 (1971) are essential public rights or benefits and if restricted because of wealth must be viewed with strict scrutiny.

law and has unconstitutionally been restricted from access to the courts because of the improper application of the reasonableness standard to 26 U.S.C. 6212(b)(1) where strict scrutiny is mandated. This Court should grant certiorari to exercise its power of supervision over the Court of Appeals because of the departure from the mandated course of judicial proceedings, the conflict with applicable decisions of this Court, and the violation of the Petitioner's rights.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1643

VIRGIL R. RIZZO,

Appellant

v.

THOMAS L. DAVIS, District Director
Internal Revenue Service

(Civil No. 78-0797 - W.D. of Pa. - Pittsburgh)

Submitted Under Third Circuit Rule 12(6)
July 21, 1980

BEFORE: SEITZ, Chief Judge, GIBBONS and WEIS, Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

Chief Judge

ATTEST:

Thomas F. Quinn
Clerk

JUL 2[illegible]

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 79-1643

VIRGIL R. RIZZO,

Appellant

v.

THOMAS L. DAVIS, District Director
Internal Revenue Service

(Civil No. 78-0797 - W.D. of Pa. - Pittsburgh)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Seitz

Chief Judge

Dated: September 22, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

VIRGIL R. RIZZO, Plaintiff vs. THOMAS L. DAVIS, District Director, Internal Revenue Service, Defendant	:	Civil Action No. 78-797D

ORDER

AND NOW, March 19, 1979, it is ordered that the defendant's Motion for Summary Judgment is granted. Plaintiff's Cross-Motion for Summary Judgment is denied.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

cc: Virgil R. Rizzo
Post Office Box 524
Warrendale, Pa. 15085

Gregory S. Hrebiniak, Esq.
Trial Attorney
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

Robert J. Cindrich, U.S. Attorney
United States Courthouse
Pittsburgh, Pa. 15219

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

VIRGIL R. RIZZO, Plaintiff	:	
vs.	:	Civil Action No. 78-797D
THOMAS L. DAVIS, District Director, Internal Revenue Service, Defendant	:	

MEMORANDUM

BARRON P. McCUNE, District Judge
March 19, 1979.

Plaintiff, Virgil R. Rizzo, brings this action pursuant to provisions of the Internal Revenue Code, specifically 29 U.S.C. §7421(a), seeking an injunction against the defendant, the Commissioner of the Internal Revenue Service (IRS), which would bar the IRS from executing a federal tax lien against him. The case is before this court on cross motions for summary judgment. The relevant facts are undisputed. Briefs have been considered and oral argument has been heard.

On March 8, 1978, the IRS assessed tax deficiencies in the amounts of $259.18 and $35,020.71 against plaintiff for the calendar years 1970 and 1973, respectively. On May 22, 1978, the IRS filed a tax lien against the plaintiff. Both the lien and assessment are valid only if the assessment was made within the three year statute of limitations contained in 29 U.S.C. §6501 or the statute of limitations was tolled by the issuance of a valid deficiency notice within the statutory period. 29 U.S.C. §§6503 and 6212.

A deficiency notice was sent to plaintiff by certified mail on October 20, 1977. The statute of limitations ran to November 14, 1977. If the October deficiency notice is valid, that statute was tolled and IRS may proceed. If the notice is invalid, the IRS may not proceed.

The deficiency notice was sent to plaintiff at P.O. Box 14611, Fort Lauderdale, Florida 33302. This address was taken from a power of attorney filed by plaintiff, which stated his address and named a Florida attorney as plaintiff's representative for purposes of the IRS investigation of the tax returns for the years in question. Plaintiff filed this power of attorney with the IRS on April 4, 1977.

Plaintiff's correct residence address is contended by plaintiff to be a Warrendale, Pennsylvania post office box. This Warrendale address appears on all plaintiff's returns from 1970 to the present, including the returns for which a deficiency was filed. It does not appear whether plaintiff's return for 1977 was filed subsequent to the power of attorney and prior to the mailing of the notice of deficiency. 1/

Plaintiff argues that the Warrendale address was his last known address for purposes of 29 U.S.C. §6212. Since the notice was sent to the Fort Lauderdale address, plaintiff contends the notice is invalid.

Deficiency notices are governed by 29 U.S.C. §6212. That section provides:

> "(a) In general. If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by

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1/ It is unclear whether the power of attorney was the last address used by plaintiff in any correspondence with the IRS. Even assuming the 1977 return was the last correspondence with the IRS, the IRS was nonetheless justified in relying on the power of attorney in deciding what address was the last known address of the plaintiff, since the power of attorney was the last official correspondence of the plaintiff with the IRS concerning the investigation in question.

subtitles A or B, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for notice of deficiency.-

(1) Income and gift taxes. - In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A or chapter 12, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence."

The term "last known address" is not defined in the Internal Revenue Code. Numerous courts have, however, interpreted the term. The Court of Appeals for the Third Circuit has held:

> "The Internal Revenue Service is often presented with more than one address for a taxpayer, and where in the course of dealings between the Commissioner and the taxpayer, letters are successfully sent to different addresses, it is unreasonable to assume that one and not the other of the addresses is the 'last known address' for the purpose of giving the deficiency notice. For this reason in Delman v. Commissioner, 384 F.2d 929 (3d Cir. 1967) cert. denied, 390 U.S. 952 (1968), we accepted the view that the last known address is an address to which the Commissioner in all the circumstances may reasonably believe the taxpayers wish the notices sent. Berger v. Commissioner, 404 F.2d 668, at 671 (3d Cir. 1968).

In this instance the Florida address was the last address on a document relating to the investigation of the returns in question. The document named a Florida attorney as a representative. The assessment concerned transactions which occurred in Florida. The returns and record generally indicate that plaintiff was a physician working for a small professional corporation in Florida from at least 1973 until at least 1977. It was reasonable, therefore, for the IRS to believe the plaintiff

actually resided at the Florida address, rather than the address used solely for mailing returns. We therefore find the deficiency notice to have been properly issued.

The record is unclear as to the actual physical residence of the plaintiff. All exhibits support the conclusion that plaintiff practiced in the Fort Lauderdale area at all times relevant to this case, or at least until April of 1977. It is unusual that plaintiff, while a Florida resident, used a Pennsylvania address for purposes of filing tax returns. The confusion engendered as a result of plaintiff's use of two addresses should not allow him to escape taxation.

Plaintiff argues, on the basis of numerous cases, that the address on his returns is his "last known address." These cases are distinguishable. Plaintiff is attempting to assign to §6212 a technical meaning never intended by Congress and not supported by controlling case law in this circuit. For this reason, defendant's motion for summary judgment must be granted.

An appropriate order follows.

BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

Dated: March 19, 1979.
cc: Counsel of record.

Internal Revenue Service

11601 Roosevelt Blvd.
Philadelphia, Pa. 19155

DP-542
28752008

Date: 12-4-78

Dear Mr. Rizzo

Thank you for your letter of Nov. 10, 1978.

I have checked your account and the current address shown is:

VIRGIL R. RIZZO
P. O. Box 524
WARRENDALE, PA. 15086

This address has been the same since 1970. I hope this information is helpful.

SS# 169-28-2998
YR -

Margaret Slatton
Tax Examiner

Phone 215-969-2666

Form 5260 (6-74) Department of the Treasury

App. C-1

Internal Revenue Service

169-28-2998
59-1357808

4800 Buford Highway
Chamblee, Georgia 30006

Date:
DEC 05 1978

Dear Ms. Rizzo

We received your letter regarding your address. The accounts for SSN 169-28-2998 and EIN 59-1357808 are shown under the address on your letter dated Nov. 10, 1978. P.O. Box 524 Warrendale, Pa. 15086

If you have any further questions about this matter, please call the telephone number shown below:

404-455-2711
(Not Toll Free)

Marie Adams
Taxpayer Assistor
07730844

Form 5260 (6-74) Department of the Treasury

No. 80-1041

In the Supreme Court of the United States

OCTOBER TERM, 1980

VIRGIL R. RIZZO, PETITIONER

v.

THOMAS L. DAVIS, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1041

VIRGIL R. RIZZO, PETITIONER

v.

THOMAS L. DAVIS, DISTRICT DIRECTOR
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner seeks review of the decision below holding that his suit to enjoin the collection of income taxes assessed against him for 1970 and 1973 was barred by the Anti-Injunction Act (26 U.S.C. 7421(a)).

The pertinent facts may be summarized as follows: During 1973, petitioner worked as a physician in Plantation, Florida (A. 59, 85).[1] The Internal Revenue Service received his individual tax return for that year on November 13, 1974 (A. 5). On April 17, 1975, the Internal Revenue Service received an amended return for petitioner's 1970 tax year (A. 80). Petitioner listed his name and address on both returns as Virgil R. Rizzo, Post Office Box 237, Warrendale, Pennsylvania 15086 (A. 80; Pet. App. B-3, B-5).

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[1] "A" refers to the record appendix filed in the court of appeals.

Some time thereafter, the Internal Revenue Service commenced an investigation of petitioner for 1971-1975. Petitioner accordingly filed a power of attorney with the Service appointing E. Louis Fields, of Fort Lauderdale, Florida, as his attorney to represent him in all matters relating to the investigation. The power of attorney was dated April 4, 1977, and listed petitioner's name and address at the top of the form as Virgil R. Rizzo, M.D., Post Office Box 14611, Fort Lauderdale, Florida, 33302 (A. 37). At the time that petitioner signed this power of attorney, he was living in Fort Lauderdale, Florida (Pet. App. B-4 to B-5).

Pursuant to audits made in connection with its investigation, the Internal Revenue Service determined deficiencies against petitioner for 1970 and 1973. On October 20, 1977, the Service sent two statutory notices reflecting those deficiencies to petitioner by certified mail at the Fort Lauderdale, Florida address set forth on the power of attorney form (A. 25, 30; Pet. App. B-3). These certified letters were subsequently returned to the Internal Revenue Service because they were never claimed by the addressee (A. 29, 34). On March 8, 1978, the Internal Revenue Service assessed petitioner for the deficiencies determined against him for those years (A. 10; Pet. App. B-2).

Petitioner thereupon instituted this suit in the United States District Court for the Western District of Pennsylvania seeking to enjoin collection with respect to the tax assessments for 1970 and 1973. Petitioner alleged that the assessments were illegal (and hence subject to injunction under Section 6213(a) of the Internal Revenue Code of 1954) because the notices of deficiency for those years had not been sent to his last known address and were therefore invalid. After finding that the notices of deficiency were validly mailed to petitioner's last known address, the district court dismissed the suit as prohibited by the Anti-Injunction Act (26 U.S.C. 7421(a)) (Pet. App. B-1). The court of appeals affirmed (Pet. App. A-1).

The decision below correctly held that the Anti-Injunction Act barred petitioner's suit. That statute generally provides that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. As this Court noted in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 6 (1962), the effect of the statute is to deprive the courts of jurisdiction over such actions unless they fall within one of the specific statutory exceptions or unless the plaintiff can show (1) that under no circumstances can the government prevail on the merits of its claim, and (2) that he has no adequate legal remedy. Here, petitioner has failed to meet either prong of this test. First, he has not shown that the government would not ultimately be entitled to prevail on the merits of the assessment. Second, petitioner has an adequate legal remedy because he may pay the assessment and bring a refund suit in the district court.

Nor does this case fall within any of the specific statutory exceptions to the Anti-Injunction Act. Section 6213(a) of the Internal Revenue Code of 1954 generally prohibits the assessment and collection of a deficiency before the issuance of a statutory notice of deficiency and the expiration of the time allowed under the statute for the filing of a petition with the Tax Court for a redetermination of the deficiency. But the assessments in this case were not made during the prohibited period referred to in Section 6213(a). Here, the Service mailed notices of deficiency to petitioner on October 20, 1977, and waited until the time had expired for filing a petition with the Tax Court before assessing those deficiencies on March 8, 1978.

Petitioner, however, contends (Pet. 8-11) that the notices of deficiency mailed to him on October 20, 1977, were invalid because they were not mailed to his "last known address" under Section 6212(b)(1) of the Code. Under that provision, a notice of deficiency, if mailed to a taxpayer's last known address, is valid, even though it is not actually

received by the taxpayer. *Berger* v. *Commissioner*, 404 F. 2d 668, 673 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969); *Wilson* v. *Commissioner*, 564 F. 2d 1317, 1319 (9th Cir. 1977); *United States* v. *Ahrens*, 530 F. 2d 781 (8th Cir. 1976); *Cataldo* v. *Commissioner*, 60 T.C. 522, 524 (1973), aff'd per curiam, 499 F. 2d 550 (2d Cir. 1974). While the term "last known address" is not defined in the Internal Revenue Code, the courts of appeals have uniformly held that it is the address where the Commissioner reasonably believed the taxpayer wished to be reached. *Delman* v. *Commissioner*, 384 F. 2d 929, 932 (3d Cir. 1967), cert. denied, 390 U.S. 952 (1968); *Berger* v. *Commissioner*, 404 F. 2d 668, 671 (3d Cir. 1968), cert. denied, 395 U.S. 905 (1969) *Sorrentino* v. *Ross*, 425 F. 2d 213, 215 (5th Cir. 1970); *United States* v. *Ahrens*, 530 F. 2d 781, 785 (8th Cir. 1976); *Alta Sierra Vista, Inc.* v. *Commissioner*, 62 T.C. 367, 375 (1974), aff'd, 538 F. 2d 334 (9th Cir. 1976); *Kennedy* v. *United States*, 403 F. Supp. 619, 623 (W.D. Mich. 1975), aff'd, 556 F. 2d 581 (6th Cir. 1977).

Here, the facts strongly support the district court's conclusion that the Commissioner acted reasonably in sending the notices of deficiency to petitioner's Florida address. While petitioner did list his Pennsylvania address on his 1973 tax return, it was altogether reasonable for the Commissioner to believe that petitioner wished the deficiency notices sent to his Florida, rather than his Pennsylvania, address, because petitioner lived and worked in Florida during the relevant period, and listed a Florida address on the power of attorney form signed by him in 1977. The fact that petitioner failed to claim the notice, sent to him by certified mail, cannot serve to invalidate the notice which was directed to his actual address.

Petitioner's contention (Pet. 11-13) that he was deprived of due process because he did not actually receive the deficiency notices is also without merit. Persons who do not

receive actual notice of the Commissioner's deficiency determinations are not denied their right to challenge the Commissioner's assertions of liability. As this Court pointed out almost 50 years ago in *Phillips* v. *Commissioner*, 283 U.S. 589, 597 (1931), a person in such circumstances remains free to pay the tax, file claims for refund, and, if those claims are denied, to bring refund suits in the district courts or the Court of Claims. In *Phillips*, the Court held that the availability of these separate refund suits meets the requirements of due process without regard to the availability of the alternative procedures Congress has established. Accord: *Cohen* v. *United States*, 297 F. 2d 760, 772 (9th Cir.), cert. denied, 369 U.S. 865 (1962); *Brown* v. *Lethert*, 360 F. 2d 560, 562 (8th Cir. 1966); *Drake* v. *Commissioner*, 554 F. 2d 736, 739 (5th Cir. 1977); *Wilson* v. *Commissioner*, 564 F. 2d 1317, 1319 (9th Cir. 1977).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1981

DOJ-1981-01

SUPREME COURT OF THE UNITED STATES

October Term 1980

No. 80-1041

VIRGIL R. RIZZO, Petitioner,

versus

THOMAS L. DAVIS, District Director
Internal Revenue Service,

Respondent.

REPLY BRIEF FOR THE PETITIONER

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pro se

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ARGUMENT

I. THE SOLICITOR GENERAL RELIES ON AUTHORITY THAT HAS BEEN OVERRULED.

The denial of Petitioner's due process and equal protection rights to contest his tax deficiency determination cannot be justified by the Respondent's reliance on Phillips v. Commissioner, 283 U.S. 589 (1931). Phillips was overruled in 1976 in Commissioner v. Shapiro, 424 U.S. 614 when this Court said:

> Accordingly neither the holding nor the dicta in Phillips support the proposition that the tax collector may constitutionally seize a taxpayer's assets without showing some basis for the seizure under circumstances in which the seizure will injure the taxpayer in a way that cannot be adequately remedied by a Tax Court judgment in his favor.

Shapiro shows that the Petitioner here is entitled to relief under the Anti-Injunction Act because he has neither a legal remedy nor an opportunity to show who may prevail. Enochs v. Williams Packing Co., 370 U.S. 1 (1962).

II. THE IRS CANNOT RELY ON A POWER OF ATTORNEY WHICH IT FAILED TO COMPLY WITH.

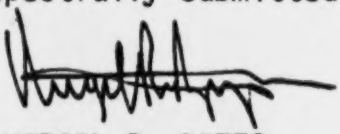
Respondent's failure to send Petitioner's attorney a copy of the "notice of deficiency" in disregard to the direction of the power of attorney and then to claim the

address thereon as the only proper address, to the detriment of the Taxpayer, is inequitable and unjust. The IRS cannot on one hand justly expect to hide behind the power of attorney as to its content and on the other hand ignore its direction to support an argument in its favor. This Court should grant certiorari to settle the inequity generated from application of different criteria in determining a taxpayer's last known address.

CONCLUSION

This Court should grant certiorari to resolve the conflict in the Circuits, to protect the rights of the Petitioner and to exercise its power of supervision over the Court of Appeals because of the conflict with applicable decisions of this Court.

Respectfully submitted,



VIRGIL R. RIZZO